88-966

No.

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1988

MARIBETH SWEENEY,

and

SUSAN SWEENEY,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

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QUESTIONS PRESENTED

I. Is due process violated when an appellate court, in an appeal initiated by the State, reinstates criminal convictions and prison sentences, thereby causing deprivation of liberty, absent any brief or argument on behalf of the defendant-appellees?

II. Does the federal constitutional right to counsel attach when the State initiates an appeal of an order granting post-conviction relief? If so, is the right to effective assistance of counsel violated where counsel fails to file a brief?

III. Does due process include a right to a speedy appeal? If so, is the right to a speedy appeal violated when the State takes approximately two years to file a brief in an appeal that it initiated?

IV. Can a criminal trial can be deemed in violation of the constitutional right to a fair trial, and thereby require the awarding of a new trial in a post-conviction proceeding, when the trial judge expressly finds that he had not given the defendants a fair trial?

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No.

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MARIBETH SWEENEY,

and

SUSAN SWEENEY,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

PRAYER

Petitioners Maribeth Sweeney and Susan Sweeney respectfully pray that a writ of certiorari issue to review the judgment and order of the Illinois Appellate Court or, in the alternative, that the judgment and order of the Illinois Appellate Court be vacated for reconsideration in light of *Penson v. Ohio*, 87-6116, slip op. (U.S. Sup. Ct. 11-29-88).

OPINIONS BELOW

The order of the trial court granting post-conviction relief is attached hereto in the Appendix ("App.") at 1-3. The opinion and orders of the Illinois Appellate Court, reversing the trial court, and denying rehearing and request for remand are unreported and attached in the

Appendix at 4-10. The orders of the Illinois Supreme Court denying the petitioners' Petition for Leave to Appeal and Motion for Leave to File a Motion for Reconsideration of Denial of Leave to Appeal are attached in the Appendix at 11-12.

JURISDICTION

On October 6, 1988, the Illinois Supreme Court denied the petitioners' Petition for Leave to Appeal. This petition is filed within sixty days of the order denying the Petition for Leave to Appeal and is thus timely. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part, "In all criminal prosecutions the accused shall enjoy. . . the right to have assistance of counsel for his defence." U.S. CONST. amend. VI.

The Fourteenth Amendment to the United States Constitution provides in pertinent part, "nor shall any State deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

In April of 1981, a trial court in the Circuit Court of Cook County found Maribeth and Susan Sweeney guilty of conspiracy and delivery of a controlled substance. The charges centered around an alleged delivery of four ounces of cocaine to an undercover agent. Following the authority of an Illinois Appellate Court decision that held the statutory requirement of a mandatory prison term between six and thirty years for the offense of delivery of over 30 grams of cocaine unconstitutional, *People v. McCarty*, 93 Ill. App. 3d 898, 418 N.E.2d 26 (1981), the trial court sentenced both Maribeth and Susan Sweeney to a term of 30 months probation, 6 months work release and a $2500 fine. Maribeth and Susan Sweeney then began to serve the imposed sentences.

Thereafter, the State sought a writ of mandamus from the Illinois Supreme Court, contending that the petitioners should have been sentenced to mandatory prison terms of six to thirty years. While the State's mandamas petition was pending, the Illinois Supreme Court reversed the appellate court's *McCarty* decision. *People v. McCarty*, 86 Ill. 2d 247, 427 N.E.2d 147 (1981). On the basis of *McCarty*, the Illinois Supreme Court vacated the petitioners' sentences and ordered the trial court to sentence them in "accordance with the law". On remand, the trial court found that he had failed to give the petitioners a fair trial and granted their motion for a new trial.

The State again sought mandamus, contending that the trial court lacked jurisdiction to grant a new trial. The Illinois Supreme Court, over a dissent, granted a writ of mandamus and ordered the trial court to sentence the petitioners to mandatory six to thirty year prison terms. *See People ex rel. Daley v. Schreier*, 92 Ill. 2d 271, 442 N.E.2d 185 (1982). On December 17, 1982, Maribeth and Susan Sweeney were each sentenced to six years of imprisonment. The petitioners, represented by privately retained trial counsel, then filed a notice of appeal from their convictions. Their direct appeal, however, was dismissed for want of prosecution – counsel failed to file a brief.

Subsequently, Maribeth and Susan Sweeney filed post-conviction petitions. The post-conviction petitions were assigned to a judge other than the trial judge. In the petitions, the petitioners argued, on the basis of the trial judge's statement that he had failed to render a fair trial, that they were denied their constitutional right to a fair trial. On February 18, 1985, the court granted the post-conviction petitions and ordered a new trial. App. at 1-3.

The State appealed the order granting post-conviction relief. While on appeal, the appellate court dismissed the State's appeal for want of prosecution. However, absent

objection from the petitioners' counsel, the State successfully moved the appellate court to reinstate its appeal. On January 28, 1987, approximately two years after the filing of its notice of appeal, the State filed a brief in the Illinois Appellate Court. For one year, the case remained on the Illinois Appellate Court's docket absent the filing of a brief by counsel for Maribeth and Susan Sweeney. On January 6, 1988, without any appellate court order directing counsel to file a brief, warning that the case would proceed to disposition if a responsive brief was not filed, waiver of the petitioners' right to file a brief, or oral argument, the Illinois Appellate Court reversed the order granting post-conviction relief, *see* App. at 4-7, thereby reinstating the petitioners' convictions and six year prison sentences.

At that juncture, the petitioners learned of their counsel's defaults and retained new counsel. A petition for rehearing and a motion seeking remand were filed in the Illinois Appellate Court. The appellate court denied both requests without opinion. *See* App. at 8-10. Maribeth and Susan Sweeney then filed a timely Petition for Leave to Appeal in the Illinois Supreme Court. On October 6, 1988, the Illinois Supreme Court denied that petition. *See* App. at 11. On October 26, 1988, the petitioners filed a motion seeking reconsideration of the denial of the petition for leave to appeal or vacation of the Illinois Appellate Court's decision, based on a recent Seventh Circuit case that held that the failure to file a responsive brief in an appeal initiated by the State constituted *per se* ineffective assistance of counsel.[1] The Illinois Supreme Court, however, denied leave to even file that motion. *See* App. at 12. Maribeth and Susan Sweeney now petition this Honorable Court for the issuance of a writ of certiorari.

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[1] The petitioners have advanced the grounds asserted in this petition in the Motion for Remand and Petition for Rehearing filed in the Illinois Appellate Court and the Petition for Leave to Appeal and Motion for Reconsideration filed in the Illinois Supreme Court.

REASONS FOR GRANTING THE PETITION

I. THIS PETITION SHOULD BE GRANTED SO THAT THIS COURT MAY DETERMINE WHETHER DUE PROCESS PERMITS AN APPELLATE COURT TO RENDER A DECISION DEPRIVING AN INDIVIDUAL OF HER LIBERTY SOLELY ON THE BASIS OF THE STATE'S ARGUMENTS AND ABSENT A BRIEF OR ARGUMENT ON BEHALF OF THE INDIVIDUAL.

Does due process permit an appellate court to render a decision resulting in the deprivation of liberty absent any brief or argument on behalf of the individual who had liberty interests at stake? That is an issue presented in this petition. It is an issue that is plainly vital to the fair administration of justice in the appellate courts across this nation. It is an issue that has not been fully considered or addressed by this Honorable Court.

The Illinois Appellate Court, in a State-initiated appeal, reversed an order granting the petitioners post-conviction relief absent any brief or argument from the petitioners, absent notice to the petitioners that the court was going to resolve the case solely on the basis of the State's brief, absent voluntary and intelligent waivers of the right to file a brief, absent giving the petitioners notice that their counsel had been neglecting pursuit of the appeal (thus affording an opportunity to proceed *pro se* or to procure new counsel) and absent indication that it had conscientiously scoured the record for points in the petitioners' favor. By proceeding in such a manner, the court denied the petitioners due process in its most basic and raw form and acted in a manner plainly repugnant to notions of fundamental fairness. This petition therefore should be granted so that this Honorable Court may rectify the constitutionally intolerable procedures employed here and provide the due process parameters required in a case such as this one.

The claim raised here is one grounded in the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Surely, the petitioners had cognizable due process rights in the State-initiated appeal of the order granting them post-conviction relief; their liberty was at stake and deprivation was threatened as a result of state action – an adverse decision would result in reinstatement of criminal convictions and prison terms. Consequently, given the existence of an interest protected by the Due Process Clause, the protections and guarantees of the Due Process Clause apply. *E.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985). In addition, due process protections apply because the State of Illinois has constructed a system of appellate review in post-conviction cases. As such, the State must "act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985) (cases cited therein).[2]

At a bare minimum, due process requires the State to provide a person whose liberty is at stake with a meaningful opportunity to be heard at a meaningful time, i.e., before deprivation absent exigency. *E.g., Loudermill*, 470 U.S. at 542; *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Hence, an individual has a right to counter a

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[2] This Court has decided that the Due Process Clause does not encompass a right to counsel in a post-conviction proceeding. *Pennsylvania v. Finley*, 481 U.S. 551 (1987). But, as *Evitts* makes clear, this is not to say that the Due Process Clause has no applicability in post-conviction appeals. Even *Finley*, which held that the respondent had received due process where counsel in a post-conviction case independently reviewed the trial record, consulted with the respondent and advised the court that a post-conviction petition would not present meritorious issues - a conclusion in which the trial court also concurred after independently reviewing the record – recognizes that some due process protections apply where the State has acted in the post-conviction field.

State's appellate assault on a judgment granting post-conviction relief by presenting arguments in support of her position at a meaningful time, whether *pro se* or otherwise. To deny such a right is to deny due process. In no case has this Court held that an individual with liberty interests at stake has no right to be heard at all. In this case, however, that is exactly what happened. Albeit wholly unrecognized by the courts below, the procedures utilized in this case are unequivocally violative of the meaningful opportunity to be heard component of the Due Process Clause, to say nothing of fundamental fairness.

Furthermore, brief application of the tri-partite test set forth by this Court in *Mathews* fortifies the conclusion that due process has been violated in this case. First, the liberty interest at stake in a State-initiated appeal that will result in the deprivation of liberty in the event of a decision adverse to the individual is weighty, compelling, undoubtedly significant and hardly inconsequential. Second, by deciding a case without a brief, the risk of erroneous deprivation becomes prominent. Appellate briefs are an essential function of our adversarial system. In short, if briefs or arguments were not needed by a court of review to make a fair and informed decision, then they would not be required. But, briefs are necessary. *See Penson v. Ohio*, 87-6116, slip op. (U.S. Sup. Ct. 11-29-88) (recognizing the value and necessity of an independent advocate presenting a brief). They apprise a court of a litigant's position, marshall facts, and present arguments. They are essential to prevent an erroneous decision – the whole function underlying appellate review. Moreover, by deciding a case absent arguments from one side, a court is forced to play the abhorrent dual role of advocate and judge, thereby risking erroneous deprivation since the court traditionally does not, and should not, function as a chosen advocate, and may not advance, consider or perceive dispositive argu-

ments or facts.[3] Third, the government also has an interest in a fair and balanced criminal justice system in which decisions affecting an individual's liberty are not made on the basis of one side's arguments. *Id.* ("truth – as well as fairness – is 'best discovered by powerful statements on both sides of the question.'"). While it is also true that the government has an interest in speedy resolution of criminal cases, the societal and economic costs of employing procedures other than deciding an appeal absent the filing of a brief, and in accordance with the rudimentary requirements of due process, are indeed minimal, more so when compared to the weighty and significant liberty interests at stake, and not outweighed by finality interests. The State would not be unduly burdened by dispensing some simple form of notice that would secure the filing of a responsive brief or a knowing, voluntary and intelligent waiver of the right present advocacy at a meaningful time.[4] On balance, the foregoing analysis of the *Mathews* factors confirms that due process was violated by the procedure employed by the appellate court in this case. *See also Penson v. Ohio*, 87-6116, slip op. (11-29-88) (reversing where state appellate

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[3] In opposition to the petitioners' Motion to Reconsider Denial of the Leave to Appeal, the State submitted an affidavit which showed that 189 appeals were instituted by the State of Illinois between May, 1983 and September, 1988. Of these 189 appeals, defendants failed to file briefs in 61 cases. Of the 61 cases where the court proceeded to disposition in the absence of the defendant's brief, reversals were ordered in 51 cases. On the other hand, defendants filed responsive briefs in 128 of the State-initiated appeals, and reversals were ordered in 77 of those cases. Obviously, the sheer statistical difference between the percentage of reversals ordered in cases where a brief was filed and ones where no brief was filed establishes the importance and necessity of appellate advocacy.

[4] A State can easily craft procedural rules to assure the filing of a brief where an attorney has neglected or abandoned an appeal, *Evitts v. Lucey*, 469 U.S. 387, 399 (1985), and many courts have done so. *Cf. Penson v. Ohio*, 87-6116, slip op. (11-29-88); *McCoy v. Court of Appeals of Wisconsin*, 468 U.S. –, 108 S. Ct. 1895 (1988); *Anders v. California*, 386 U.S. 738 (1967).

court proceeded to disposition in the absence of a brief from the appellant); *United States ex rel. Thomas v. O'Leary*, 856 F. 2d 1011 (7th Cir. 1988) (affirming the granting of habeas corpus where the Illinois Appellate Court decided a State-initiated appeal of an order granting a suppression motion in the absence of a brief or argument from the defendant-appellee). *Cf. Swenson v. Bosler*, 386 U.S. 258 (1967) (holding unconstitutional Missouri's procedure of having the court rule on an indigent's appeal on the basis of a motion for a new trial, the record and a *pro se* brief or no brief at all).

The loss of liberty can never be replaced. The procedures employed by the appellate court below are constitutionally intolerable. Given the importance of the instant due process issue (that has yet to be considered by this Court) to the fair administration of justice, this Court should grant this petition. Consideration of this case on the merits will permit implementation of the minimal due process procedural requirements to be followed where an attorney neglects to file a brief in case which threatens deprivation of liberty and cure the patent constitutional error of wholly depriving the petitioners an opportunity to present "their side of the story" prior to a deprivation of liberty.

II. THIS PETITION SHOULD BE GRANTED SO THAT THIS COURT MAY DETERMINE WHETHER THE FEDERAL CONSTITUTIONAL RIGHT TO COUNSEL ATTACHES WHEN THE STATE INITIATES AN APPEAL OF AN ORDER GRANTING POST-CONVICTION RELIEF.

This case presents another important constitutional issue that has not been previously considered by this Honorable Court: Whether an individual has a right to effective assistance of appellate counsel in a post-conviction pro-

ceeding where she has obtained post-conviction relief at the trial level and the State initiates an appeal, seeking to reinstate her conviction and prison sentence. This petition should be granted to determine whether the Sixth and Fourteenth Amendments embody a right to counsel in such a situation.

Illinois' post-conviction statute explicitly creates a right to counsel in post-conviction proceedings that are deemed meritorious after initial judicial review. Ill. Rev. Stat. ch. 38 § 122-4. The creation of this state right, however, does not correlate a federal constitutional right to counsel. *Pennsylvania v. Finley*, 481 U.S. 551 (1987). But this is not to say that the constitution does not include a right to counsel where the *State* initiates an appeal, rather than a defendant. Thus, it must be determined whether the constitutional right to counsel attaches in such a situation.

This Court's "cases dealing with the right to counsel – whether at trial or on appeal – have often focused on the defendant's need for an attorney to meet the adversary presentation of the prosecution." *Evitts v. Lucey*, 469 U.S. 387, 394 n. 6 (1985). *See also Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (the constitution requires counsel at critical stages, i.e., where potential substantial prejudice to defendant's rights inheres and where counsel's abilities can help avoid that prejudice). The need for counsel to protect one from the State's focused appellate commitment to deprive liberty cannot be understated. The appellate process, of course, "is governed by intricate rules that to a layperson would be hopelessly forbidding" and thus the unrepresented "is unable to protect the vital interests at stake." *Evitts*, 469 U.S. at 369. It is only an attorney, trained in the intricacies of the appellate process, that can "fend off the efforts of the State's prosecutor", *Ross v. Moffitt*, 417 U.S. 600, 610 (1974), to reinstate a finding of guilt.

Cf. Powell v. Alabama, 287 U.S. 45, 69 (1932). In such a situation, an attorney is needed not as a sword, but as a shield to protect from the prosecution's bid to strip liberty, thereby mandating attachment of the right to counsel and making this case wholly inapposite from cases where the *defendant* seeks to mount a collateral attack on his conviction and does not have a constitutional right to counsel. *See Finley*, 481 U.S. 551; *Wainwright v. Torna*, 455 U.S. 586 (1982) (per curiam); *Ross v. Moffitt*, 417 U.S. 600; *Johnson v. Avery*, 393 U.S. 483, 487-88 (1969).[5] In sum, the considerations supporting the existence a federal constitutional right to counsel wholly apply in instances where the State commits itself to an effort to deprive liberty by seeking an appellate court's reversal of the granting of post-conviction relief. Consequently, this petition should be granted so that this Court can definitively decree that the constitutional right to counsel attaches in such a situation. *Cf. United States ex rel. Thomas v. O'Leary*, 856 F. 2d 1011 (7th Cir. 1988) (holding that a defendant has a constitutional right to counsel where the State appeals the granting of a suppression order).

Of course, if the constitutional right to counsel attaches, the petitioners are entitled to effective assistance of counsel as a matter of federal law. In this case, there is no escaping the conclusion that the assistance of the petitioners' appellate counsel was anything but constitutionally effective. As this Court recently held, the failure to file an appellate brief constitutes *per se* ineffective assistance of counsel. *Penson v. Ohio*, 87-6116, slip op. (11-29-88). *See also Evitts*, 469 U.S. at 392; *Thomas*, 856 F.2d 1011. The

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[5] Here, an attorney was not only needed to respond to the State's arguments on appeal, *see infra* n. 8, but also to object to the State's motion to reinstate the appeal after it had been dismissed for want of prosecution.

courts below, however, refused to recognized such despite the repeated protests of the petitioners after their convictions had been reinstated absent any advocacy by their counsel. The courts below have condoned the rendering of an appellate decision, devastating to the petitioners, absent the filing of a brief by counsel. Such a course of action is at odds with the constitution's guarantees of due process and effective assistance of counsel.[6] This petition should thus be granted to correct the injustice below and to align this case with this Court's recent holding in *Penson*.

In the alternative, petitioners move this Court to vacate the judgment below for reconsideration in light of *Penson*. As noted above, Illinois law creates a state right to counsel in post-conviction proceedings. Moreover, Illinois courts have extended the guarantee of effective assistance of counsel to post-conviction proceedings. *See, e.g., People v. Allen*, 151 Ill. App. 3d 391, 502 N.E.2d 1260 (1987). As Illinois interprets its state constitution in accordance with the holdings of this Court, *e.g., People v. Tisler*, 103 Ill. 2d 226, 469 N.E.2d 147, 155-57 (1984), it necessarily follows that, under *Penson*, the petitioners' state right to effective assistance of counsel was violated by counsel's failure to file a brief, regardless of whether the petitioners had a federal constitutional right to counsel. Reconsideration also is proper since *Penson* can be construed to be based on due process principles independant from the right to counsel.

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[6]It is not unusual for the Illinois Appellate Court to decide a criminal case absent the filing of a defendant's brief. *United States ex rel. Thomas v. O'Leary*, 856 F. 2d 1011 (7th Cir. 1988); *supra* n. 3. However, in light of *Penson*, it is now clear that such a course of action is constitutionally impermissible under the Sixth and Fourteenth Amendments. *See also People v. White*, 117 Ill. 2d 194, 512 N.E.2d 677 (1987) (Simon, J. concurring); *Loop v. Solem*, 398 N.W.2d 140 (S.D. 1986).

III. THIS PETITION SHOULD BE GRANTED SO THAT THIS COURT MAY DETERMINE WHETHER THE DUE PROCESS CLAUSE ENGULFS A RIGHT TO A SPEEDY APPEAL AND TO SET GOVERNING STANDARDS IN THE EVENT THAT SUCH A RIGHT EXISTS.

This Court has yet to consider the issue of whether the Due Process Clause includes a right to a speedy appeal. Due process has been interpreted to guarantee a speedy appeal by some federal courts. *E.g.*, *Burkett v. Cunningham*, 826 F. 2d 1208, 1225 (3rd Cir. 1987); *Rheuark v. Shaw*, 628 F. 2d 297, 302 (5th Cir. 1980) (collecting cases). The State's concern for swift justice in this case was anything but keen. The State took almost two years from the date that it filed its notice of appeal to file its opening brief. The appellate court did not render a decision for another year. The delay of justice in this case constitutes yet another due process violation tainting these proceedings. The appellate process was anything but speedy and stands in patent violation of the right to a speedy appeal. In light of the foregoing, this petition should be granted so that this Court may consider the important question of whether due process includes a right to a speedy appeal where the State has instituted a system of appellate review and establish governing standards in the event that such a right exists. *Cf. United States v. $8,850*, 461 U.S. 555 (1983); *Barker v. Wingo*, 407 U.S. 514 (1972).

IV. THIS PETITION SHOULD BE GRANTED SO THAT THIS COURT MAY DETERMINE WHETHER A CRIMINAL TRIAL CAN BE DEEMED IN VIOLATION OF THE CONSTITUTIONAL RIGHT TO A FAIR TRIAL, ON THE BASIS OF THE TRIAL JUDGE'S EXPRESS FINDING THAT HE HAD NOT GIVEN THE DEFENDANTS A FAIR TRIAL.

After the Illinois Supreme Court vacated the petitioners' probation sentences and ordered the trial court to pro-

ceed "in accordance with the law", the trial court in this case granted the petitioners' motion for a new trial, finding:

> I have thought it to death. . . and I cannot say in all conscience and without any hesitation that I did so afford the defendants that full and fair trial.
>
> I am not talking about a perfect trial. I am talking about the manner in which I heard the evidence and analyzed the evidence and scrutinized the evidence and came to a decision in the case. And it is rather hard to articulate; but a couple of years ago, I asked a judge the reasoning for the only time he gave a new trial, and the only time he would ever give a new trial, and why he did so. His words were 'I just did not hear this case right and by not hearing and evaluating this case the way I know I should have, resulted in something other than a fair trial to the defendants.'
>
> And that is basically the way I feel. I did not afford the defendants a fair trial and I know it.

On the basis of the foregoing statement, the petitioners ultimately procured post-conviction relief. App. at 1-3.[7] The State, however, instituted an appeal of the order granting post-conviction relief and prevailed. The appellate court opined that post-conviction relief had been

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[7] After the trial court awarded a new trial, the State petitioned the Illinois Supreme Court for mandamus on the grounds that the trial court lacked jurisdiction to grant a new trial when it did. The Illinois Supreme Court agreed (and did not consider the merits of the issue of whether the trial court's statement justified the awarding of a new trial). After being sentenced to six year prison terms, the petitioners filed a notice appeal. The direct appeal of their convictions, however, was dismissed because counsel failed to file a brief. Maribeth and Susan Sweeney then filed post-conviction petitions, citing the trial court's statements regarding the unfairness of their trial as grounds supporting post-conviction relief.

granted "solely" on the basis of trial judge's express statement that he had not afforded the petitioners a fair trial and claimed that the petitioners failed to allege facts to support the trial judge's statement that he had deprived them of a fair trial. App. at 6-7. The court then construed the trial court's statement that the petitioners' trial was unfair to be "conclusional. . . no less so merely because it was made by the judge that presided over the defendant's trial." App. at 7.

Under the federal constitution, a trial court's statement that it failed to render a fair trial should be sufficient to justify post-conviction relief. No person other than the fact finder is in a better position to determine whether the trial was conducted in a fair manner. No person other than the fact finder is in a better position to assess the analytical process that resulted in a guilty finding. Absent bad faith, the trial judge's statement that the trial lacked fairness is certainly sufficient evidence that the petitioners indeed were deprived of their right to a fair trial. As noted by Justice Simon dissenting in the Illinois Supreme Court's decision granting the State's petition for a mandamus ordering the trial court to sentence the petitioners to mandatory prison terms between six and thirty years:

> I see no way in justice and in fairness to circumvent the trial judge's own statement that he had not given the defendants a fair trial. This was an expression of conscience which I believe our judicial system must respect so long as it was made in good faith. There is no suggestion here that Judge Schreier was acting in any other manner.

People ex rel. Daley v. Schreier, 92 Ill. 2d 271, 442 N.E.2d 185, 191 (1982).

Furthermore, the appellate court's decision, rendered on the basis of only the State's arguments and absent any advocacy on behalf of the petitioners is replete with harmful, serious and unacceptable factual, legal and constitutional errors.[8] In light of counsel's failure to file a brief marshalling facts and offering legal arguments countering the State's quest to reinstate convictions and prison sentences

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[8] The defects in the appellate court's decision can be categorized as follows:

a. Contrary to the holding of the appellate court, the post-conviction judge did not order post-conviction relief "solely" on the basis of the trial judge's statement that he had not rendered a fair trial. The judge presiding over the post-conviction petitions explicitly stated that he had considered the petitions, memoranda, the *trial record and transcript* in reaching his finding. App. at 2. (Ironically, the appellate court did not consider the trial record as that record was not submitted in the post-conviction record on appeal.)

b. Contrary to the holding of the appellate court, the trial record certainly contains facts that support the determination that the trial lacked fairness. With respect to Susan Sweeney, the defense of partial entrapment went unconsidered as it was not relevant under the binding law in effect at the time of the trial. When the trial was held, 30 grams did not constitute a dividing line between a greater and lesser offense and thus the trial court did not consider whether Susan was entrapped into committing a greater offense. The trial evidence, however, clearly supported a partial entrapment theory – the undercover agent insisted on a cocaine delivery of over 30 grams, placed tremendous pressure on 19 year old Susan, who had never before made a large delivery, to make such a delivery and Susan attempted to back down from the deal.

c. With respect to Maribeth Sweeney, the function of the 30 gram classification and its role in rendering her trial unfair also becomes apparent upon analysis of the record. Without contradiction, the evidence showed that Maribeth had absolutely nothing to do with the delivery until moments before it transpired and, while standing next to the agent's car, handed him a cookie

(Footnote continued on the following page)

and supporting affirmance of the grant of post-conviction relief, the appellate court's decision is repugnant to the constitution and hinges on flawed underpinnings. The result is a travesty. It should be reviewed and cured by this Honorable Court.

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8 *(Continued from previous page)*

jar (containing cocaine) sitting in the backseat of Susan's car. The State failed to produce competent evidence that Maribeth had knowledge that the package contained over 30 grams of cocaine or the requisite intent to commit the crime.

d. The appellate court did not acknowledge that the trial court conducted the trial under a preconceived notion that the defendants were going to be given probation and seeing as six to thirty years of *liberty* was not at stake, the trial court paid little attention to the evidence that supported not guilty findings and did not strictly hold the State to its burden of proof.

e. The appellate court relied, in part, on the waiver doctrine. The court's reliance on the waiver doctrine – that Maribeth and Susan Sweeney purportedly waived their opportunity to challenge the fairness of the trial because they "abandoned" their direct appeal – was improper since the petitioners' direct appeal had been dismissed because of ineffective assistance of counsel. *See People v. Summers*, 50 Ill. App. 3d 33, 365 N.E.2d 241 (1977). *See also People v. Rose*, 43 Ill. 2d 273, 253 N.E.2d 456 (1969) (waiver does not apply where direct appeal is not pursued).

f. In contravention of a well-established proposition that the trial court's determination regarding a post-conviction petition should not be upset unless manifestly erroneous, *see, e.g., People v. Wright*, 111 Ill. 2d 18, 488 N.E.2d 973, 979 (1986), the appellate court failed to accord deference to the trial court's ruling on the post-conviction petitions.

CONCLUSION

WHEREFORE, Petitioners Maribeth Sweeney and Susan Sweeney respectfully pray that this Honorable Court grant this petition and issue a writ of certiorari to review the judgment of the Illinois Appellate Court or, in the alternative, that the judgment and order of the Illinois Appellate Court be vacated for reconsideration in light of *Penson v. Ohio*, 87-6116, slip op. (U.S. Sup. Ct. 11-29-88).

Respectfully submitted,

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APPENDIX

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS

v.

MARIBETH SWEENEY and SUSAN SWEENEY

NO. 80-5684

ORDER

This cause is before the Court on the Petitions of the defendants, MARIBETH SWEENEY and SUSAN SWEENEY for Post-Conviction Relief and the Motion of the State to dismiss the Petitions.

From a consideration of the Petitions, attachments and references the Court FINDS:

The trial judge in this cause, who is a highly respected judge of this court, found the two defendants guilty of delivery of more than 30 grams of cocaine, a Class X felony, but ruled that the classification of cocaine as a narcotic drug was unconstitutional. This ruling was predicated upon an Appellate Court decision in People vs McCarty wherein that proposition had been adopted. Ultimately, in accordance with it's finding, the trial court sentenced the two defendants as Class 3 offenders rather than as Class X offenders as required by the governing statute.

The State filed a Petition for Mandamus in the Illinois Supreme Court seeking to reverse the trial judge's sentencing order. During the pendency of the Mandamus Petition the Supreme Court reversed the McCarty decision and issued a supervisory order to the trial judge to resentence the two defendants as required by the governing statute. Prior to acting on the supervisory order, however, the trial

judge heard and granted a supplemental Motion for a New Trial. In granting the new trial the trial judge declared that he had not given the defendants a fair trial.

The State filed a second Petition for Mandamus in the Supreme Court alleging that the trial court had exceeded it's authority in granting a new trial in that the trial court was proscribed by the supervisory order to resentence the defendants. The trial court thereupon resentenced both defendants as Class X offenders.

The Post-Conviction Petitions of the defendants allege that, in the circumstances of their trial, they did not receive a fair trial; that each was denied her constitutional right to a fair trial. This issue has not been decided by the Supreme Court in that it has not been before the Court. In ths Post-Conviction Petition, however, it is the only issue.

What is abundantly clear from a consideration of the Post-Conviction Petition, the attached Memoranda of the trial court and the trial record is that the trial judge had accepted and embraced logic and philosophy of the Appellate Court's McCarty decision which, of course, was later ruled to be an erroneous decision. But what is more important is that it appears that the trial judge heard and considered the case within the limited scope of the McCarty decision, excluding from consideration all other points raised. The trial court's Memorandum of Opinion is clear evidence that the single factor the court considered in deciding the case was the presumed unconstitutionality of classifying cocaine as a narcotic drug. All other issues raised on trial and in argument were given no consideration whatsoever. Final proof of the fact is ultimately provided by the trial court itself wherein, in its attempt to grant the defendants a new trial, and after ample opportunity to reflect, the court concluded that it may very well have afforded insufficient consideration and analysis to other

issues raised and openly acknowledged that the two defendants had not received a fair trial.

In that the right to a fair trial is one of our most cherished and fundamental constitutional rights and the tribunal before whom the defendants were tried, for sound reasons, has declared that the two citizens who are the defendants in ths case did not receive a fair trial, it follows inevitably that they have been deprived of the full measure of their guaranteed constitutional benefits. It is elemental that this benefit must be restored to them.

The State's Motion to Dismiss the Post-Conviction Petitions is denied; the post-conviction relief prayed for is granted and each defendant is granted a new trial.

Enter: /s/ Thomas J. Maloney

No. 86-0442

IN THE

Appellate Court of Illinois

FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellant,
v.
MARIBETH SWEENEY and SUSAN SWEENEY,
Defendants-Appellees.

Appeal from the Circuit Court of Cook County.

Honorable **Thomas J. Maloney,** Judge Presiding.

WHITE P.J.

THIRD DIVISION
January 6, 1988

NOTICE

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the dispos of the same.

ORDER

The subject of this appeal is an order granting defendants relief under the Post-Conviction Hearing Act. Ill. Rev. Stat. 1985, ch. 38, par. 122-1 *et seq.* No brief was filed by the defendants.

Following a bench trial, defendants were convicted by Judge James M. Schreier of knowingly delivering more than 30 grams of a substance containing cocaine. (Ill. Rev. Stat. 1979, ch. 56 1/2, par. 1401(a)(2).) This offense was classified as a Class X felony with a minimum penalty of six years in prison. (Ill. Rev. Stat. 1979, ch. 38, par. 1005-8-1(a)(3).) At the conclusion of the trial, defendants filed a motion alleging several grounds for a new trial. Judge Schreier rejected all but one of those allegations. Relying on *People v. McCarty* (1981), 93 Ill. App. 3d 898,

418 N.E.2d 26, Judge Schreier concluded that the statutory classification of defendants' offenses was unconstitutional and sentenced defendants as Class 3 offenders.

The State filed a direct appeal to the Illinois Supreme Court challenging Judge Schreier's refusal to sentence defendants as Class X offenders. During the pendency of that appeal, the supreme court reversed the appellate court's decision in *People v. McCarty (People v. McCarty* (1981), 86 Ill. 2d 247, 427 N.E.2d 147) and issued a supervisory order directing Judge Schreier to resentence defendants as Class X offenders.

On remand, defendants filed another motion for a new trial which included many of the same grounds contained in their prior motion. The State moved to strike the second motion claiming that Judge Schreier lacked jurisdiction to take any action other than that required by the supreme court's supervisory order. Yet, Judge Schreier granted defendants' motion for a new trial, concluding that he had failed to give them a fair trial because he believed they could only be found guilty of a Class 3 felony. The State again appealed to the Illinois Supreme Court requesting that Judge Schreier be ordered to sentence defendants in accordance with the previously issued supervisory order. The supreme court issued a writ of *mandamus* directing Judge Schreier to resentence defendants as Class X offenders.

Judge Schreier then compiled with the writ of *mandamus* and sentenced each defendant to a term of six years, the minimum penalty for the offense. Defendants thereafter filed a notice of appeal challenging their convictions. They, however, abandoned that appeal and it was dismissed by this court for want of prosecution.[1] Defendants subsequently filed petitions for relief under the Post-

---

[1] This cause is related to 83-0144 which was dismissed for want of prosecution on July 6, 1983.

Conviction Hearing Act. (Ill. Rev. Stat. 1985, ch. 38, par. 122-1 *et seq.)* The State's motion to dismiss the petitions was denied by the trial court which granted defendants a new trial concluding that post-conviction relief was warranted by Judge Schreier's statement that he had not afforded defendants a fair trial. The State has appealed contending, *inter alia*, that the trial court erred in granting defendants a new trial solely on the basis of Judge Schreier's statement. We must agree.

It is well established that a petitioner seeking post-conviction relief bears the burden of setting forth in what respect his constitutional rights were violated and providing support for his allegations with affidavits, references in the record, or other evidence. (*People v. Newberry* (1973), 55 Ill. 2d 74, 302 N.E.2d 34; *People v. Ford* (1981), 99 Ill. App. 3d 973, 426 N.E.2d 340.) Thus, a petitioner who seeks relief from his conviction in such a proceeding must allege facts which, if proven, would show that his constutional rights were violated. See *People v. Reed* (1980), 84 Ill. App. 3d 1030, 405 N.E.2d 1065; *People v. Hoffman* (1974), 25 Ill. App. 3d 261, 322 N.E.2d 865.

In the instant case, the sole basis for granting defendants post-conviction relief was Judge Schreier's statement that he had not afforded them a fair trial. No facts were alleged which, if proven, would show how the trial was unfair. When it issued the writ of *mandamus*, the supreme court noted that Judge Schreier specifically found that defendants knowingly delivered more than 30 grams of a substance containing cocaine. (*People ex rel. Daley v. Schreier* (1982), 92 Ill. 2d 271, 442 N.E.2d 185.) Thus, Judge Schreier found defendants guilty of a Class X felony, but concluded that they could be punished for only a Class 3 offense. Judge Schreier did not say that the evidence was insufficient to convict defendants, but merely that he believed defendants could only be punished for a Class 3 felony. Judge Schreier's statement amounts to an unsup-

ported conclusion with no showing as to how the trial was unfair.

Defendants have set forth no facts which, if proven, would show specific errors in their trial or would establish a basis for the claim that they receive an unfair trial. Although the State repeatedly requested the trial court to recite such facts forming the basis for its granting of post-conviction relief, the court declined to do so. Judge Schreier's statement was conclusional and is no less so merely because it was made by the judge that presided over defendants' trial. Consequently, defendants' unsupported claim that they received an unfair trial was insufficient to warrant post-conviction relief.

Moreover, we note that this argument could have been presented by defendants in a direct appeal of their convictions. That appeal was abandoned by defendants and, therefore, was dismissed for want of prosecution. Defendants' failure to raise this issue on direct appeal constitutes a waiver. *People v. Roberts* (1979), 75 Ill. 2d 1, 387 N.E.2d 331.

For the foregoing reasons, the judgment of the circuit court of Cook County is reversed.

Judgment reversed.

McNAMARA and FREEMAN, JJ., concur.

No. 86-442

IN THE

Appellate Court of Illinois

FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS
Plaintiff-Appellant,
v.
MARIBETH SWEENEY and SUSAN SWEENEY
Defendants-Appellees.

Appeal from the Circuit Court of Cook County

Honorable **Thomas Maloney** Judge Presiding

ORDER

This cause coming on the be heard on Motion of Appellants Susan Sweeney and Maribeth Sweeney herein due notice having been given, and the Court being fully advised of the premises:

1. IT IS HEREBY ORDERED that the law firm of Genson, Steinback & Gillespie is granted leave to file his appearance as counsel on appeal.

2. IT IS HEREBY ORDERED that Mr. Kent Brody is granted leave to withdraw as counsel on appeal.

3. IT IS HEREBY ORDERED the Appellants' Motion to Stay Appeal is DENIED.

GENSON, STEINBACK & GILLESPIE
53 W. Jackson Suite 1420
Chicago, Illinois 60604
(312) 726-9015

ORDER ENTERED

FEB 29 88

/s/ William S. White
JUSTICE

JUSTICE

JUSTICE

JUSTICE

IN THE

Appellate Court, State of Illinois

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS
Respondent-Appellant
v.
MARIBETH SWEENEY and SUSAN SWEENEY
Defendant-Appellant.

NO. 86-0442

ORDER

Upon consideration of the petition for rehearing filed by the petitioners-appellees,

IT IS ORDERED that said petition for rehearing is denied.

ORDER ENTERED
MAR 30 89

Name
Attorney for
Address
City
Telephone

/s/ William S. White
Justice

/s/ Daniel McNamara
Justice

/s/ Charles E. Freeman
Justice

GILBERT S. MARCHMAN, CLERK OF THE
APPELLATE COURT, FIRST DISTRICT

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

66976

October 6, 1988

Mr. Edward M. Genson
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Chicago, IL 60604

No. 66976 –People State of Illinois, respondent, v. Maribeth Sweeney, et al., petitioners. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 1988.

STATE OF ILLINOIS
SUPREME COURT CLERK
SUPREME COURT BUILDING

JULEANN HORNYAK
CLERK OF THE COURT
(217) 782-2035

SPRINGFIELD 62706

FIRST DISTRICT OFFICE
ROOM 30-129
RICHARD J. DALEY CENTER
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(312 793-1332

November 15, 1988

Genson, Steinback and Gillespie
Attorneys at Law
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Chicago, IL 60604

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 66976 – People State of Illinois, respondent, v. Maribeth Sweeney, et al., petitioners.

Motion by petitioners for leave to file a motion for reconsideration of the order denying petition for leave to appeal. Motion *denied.*

JH:sl

cc – AG Crim
SA Crim

Supreme Court, U.S.
FILED
FEB 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

(8)

No. 88-966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MARIBETH SWEENEY and SUSAN SWEENEY,

Petitioners,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First District

RESPONDENT'S BRIEF IN OPPOSITION

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No. 88-966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MARIBETH SWEENEY and SUSAN SWEENEY,

Petitioners,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First District

RESPONDENT'S BRIEF IN OPPOSITION

PRAYER

Respondent, the People of the State of Illinois, respectfully requests that the Petition for a Writ of Certiorari be denied.

JURISDICTION

This Court lacks jurisdiction to hear any of the arguments made by petitioners, because those arguments were never made in the Illinois courts. More exactly, petitioners did file a brief in the Appellate Court of Illinois, but that brief did not contain the arguments that petitioners now make in this Court. As is noted in the Petition for a Writ of Certiorari, petitioners raised certain issues in the Appellate Court of Illinois in a Petition for Rehearing. (Petition, p. 4, n.1) However, none of the issues argued in the petition for certiorari were raised in the brief filed by petitioners in the Illinois reviewing court.

The three issues raised in the Petition for Rehearing were described by petitioners as follows in their headnotes:

> I. THIS CASE SHOULD BE REMANDED TO GIVE THE SWEENEYS AN OPPORTUNITY TO AMEND TO THEIR POST-CONVICTION PETITION AND DEVELOP FACTS AT AN EVIDENTIARY HEARING.
>
> II. THE TRIAL COURT'S ORDER GRANTING A NEW TRIAL WAS NOT MANIFESTLY ERRONEOUS.
>
> III. THIS COURT SHOULD NOT HAVE DECIDED THIS CASE ABSENT BENEFIT OF A BRIEF ON BEHALF OF THE SWEENEYS.

Thus, Issues II, III, and IV in the Petition for a Writ of Certiorari were never raised in the lower court.

At first glance it may appear that Issue I in the Petition for a Writ of Certiorari, dealing with the failure of an attorney to file a brief on behalf of a convicted defendant in a post-conviction appeal, was raised in Issue III of the Petition for Rehearing filed in the state reviewing

court. That, however, is not the case. In Issue III of the Petition for Rehearing there is no citation to any constitutional provision, nor is there any citation to any federal court decision, nor is there any constitutional argument whatsoever. In the Appellate Court of Illinois petitioners relied solely on state law in support of the argument that the reviewing court's decision should have been vacated for failure of their attorney to file a brief. Thus petitioners' current federal constitutional claim was never made in the state court.

In summary, petitioners did file a brief in the Appellate Court of Illinois, but at no time in any document filed in that court did petitioners make the constitutional claims found in their Petition for a Writ of Certiorari. Since their claims were not made in the lower state court, this Court lacks jurisdiction to hear them.

Review by this Court, of course, is restricted to those federal questions presented to the highest court of a state having jurisdiction. 28 U.S.C. sec. 1257(3). This Court will not review any federal question which was not presented in state court, even if a related state law claim was presented. *Tacon v. Arizona*, 410 U.S. 351, 93 S.Ct. 998, 35 L.Ed. 2d 346 (1973). Moreover, when a state reviewing court has failed to rule on a federal constitutional question, it will be assumed that the omission resulted from a failure to present that question properly to the state court, unless the petitioner in this Court can affirmatively show to the contrary. *Street v. New York*, 394 U.S. 576, 582, 89 S.Ct. 1354, 1360, 22 L.Ed. 2d 572, 579 (1969). Under the rule stated in *Street* it must be assumed that petitioners failed to present their federal constitutional claims to the Appellate Court of Illinois, since that court did not rule on such claims or even mention them.

Therefore this Court lacks jurisdiction to rule on the claims in the Petition for a Writ of Certiorari. Those claims were never presented to the Appellate Court of Illinois, which was the highest state court which heard this case.

STATEMENT OF THE CASE

On June 17, 1980, Maribeth and Susan Sweeney sold four ounces of cocaine to an undercover police officer for the sum of $8,000.00. (T.R. 25-34) As a result both petitioners were convicted of the crime of Delivery of a Controlled Substance and each was sentenced to a term of six years in custody. Ill. Rev. Stat. 1979, ch. 56½, sec. 1401. The convictions have long since become final (although petitioners have yet to serve their sentences). The present action arose on a post-conviction petition, a form of collateral review. Ill. Rev. Stat. 1985, ch. 38, sec. 122-1 *et seq.*

The Trial

At the trial Special Agent Claude Kaysen testified that on June 17, 1980, in a parking lot in Hickory Hills, Illinois, he had purchased 4 ounces (94 grams) of cocaine from Maribeth and Susan Sweeney. (T.R. 25-34) At the time any delivery of over 30 grams of cocaine was a Class X felony in Illinois, involving a mandatory prison term of at least six years. Ill. Rev. Stat. 1979, ch. 56½, sec. 1401(a)(2). Special Agent Kaysen testified that the June 17 transaction was the second time he had bought cocaine from Susan Sweeney, and that on June 17 Maribeth

Sweeney had told him that she and Susan could sell him four ounces of cocaine anytime he wanted. (T.R. 28)

Both petitioners testified at trial. Maribeth Sweeney testified that she had known that Susan was going to sell four ounces of cocaine, and that she (Maribeth) had come along with a large dog in order to protect her sister. (T.R. 198-202) Susan Sweeney testified that the undercover officer had persuaded her to sell him four ounces of cocaine, while in fact she had initially been willing to sell him only two ounces (57 grams). Susan explained that she had to sell the cocaine to pay off a debt to her supplier. (T.R. 125-134)

Conviction And Sentence

At the conclusion of the trial the judge found Maribeth and Susan Sweeney guilty of delivery of more than 30 grams of cocaine. (T.R. 251-52) The judge specifically found that Maribeth Sweeney had voluntarily abetted the sale of cocaine and that Susan Sweeney had not been entrapped. (T.R. 251-52)

However, the trial judge refused to sentence the defendants to the six year prison terms required by law. Instead, the trial judge held that the classification of cocaine as a narcotic drug was unconstitutional, and that therefore Maribeth and Susan Sweeney were guilty only of a lesser offense. (T.R. 262-71) Each defendant was sentenced to 30 months probation with six months of periodic imprisonment to be served during the daytime on weekends only. (T.R. 280)

The First Appeal

The prosecution appealed the sentence directly to the Illinois Supreme Court, contending that classification of

cocaine as a narcotic drug was constitutional. While the prosecution's appeal was pending, the Illinois Supreme Court decided in another case that cocaine could properly be classified as a narcotic drug. *People v. McCarty*, 86 Ill. 2d 247, 427 N.E.2d 147 (1981). Accordingly, the Illinois Supreme Court summarily reversed the trial judge's ruling as to the sentence and ruled the sentencing statute constitutional. The mandate of the Illinois Supreme Court contained the following order: "The cause is remanded to the circuit court with directions to resentence defendants in accordance with law." *People v. Maribeth Sweeney, et al.* (Ill. Sup. Ct., No. 55206, October 17, 1981, unpublished).

Proceedings On Remand

Although the trial judge had been ordered to resentence Maribeth and Susan Sweeney, he did not do so. Instead, the judge ordered that they be given a new trial, stating that he had not known that he was trying them for a Class X offense and thus had not given them a fair trial. (M.T. 19-20)*

The Mandamus Action

The prosecution began a mandamus action in the Illinois Supreme Court, contending that on remand the trial judge had jurisdiction only to resentence Maribeth and Susan Sweeney and had no jurisdiction under that mandate to grant a new trial. The Illinois Supreme Court agreed, and issued a writ of mandamus ordering the trial judge to

* "T.R." refers to the trial record, "M.T." refers to the transcript submitted to the Illinois Supreme Court in the subsequent mandamus action.

vacate the grant of a new trial and to sentence the defendants to a term in prison. *People ex rel. Daley v. Schreier*, 92 Ill. 2d 271, 442 N.E.2d 185 (1982). Subsequently the trial judge obeyed the order of the Illinois Supreme Court, and sentenced both Maribeth and Susan Sweeney to terms of six years in custody. (Petitioners' Appendix A-5)

The Second Appeal

After the resentencing Maribeth and Susan Sweeney appealed their convictions and sentences to the Appellate Court of Illinois. That appeal was dismissed for want of prosecution. (Petitioners' Appendix A-5)

The Post-Conviction Action

Maribeth and Susan Sweeney then filed a post-conviction petition in the Illinois courts, contending that on collateral review their convictions should be declared unconstitutional. They relied on the statement of the original trial judge that he had not given them a fair trial because he had not known that the punishment for their crime involved mandatory prison term. The judge who heard the post-conviction action ordered that the Sweeneys be given a new trial. (Petitioners' Appendix A-1–A-3)

The Third Appeal

The prosecution appealed the order on collateral review granting the Sweeneys a new trial. After the Sweeneys failed to file a brief on appeal, an order was entered by the Appellate Court of Illinois reversing the order of the trial judge and reinstating the convictions. (Petitioners' Appendix A-4–A-7) The Appellate Court then granted leave to the Sweeneys to substitute new counsel on appeal. (Petitioners' Appendix A-8–A-9) The new attorneys

for the Sweeneys then filed a Petition for Rehearing, raising three different issues and arguing that the order granting a new trial should have been affirmed. A month and a half after the Petition for Rehearing was filed it was denied by the Appellate Court of Illinois. (Petitioners' Appendix A-10) The Illinois Supreme Court subsequently denied leave to appeal, and the Sweeneys now seek a writ of certiorari from this Court.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

THERE IS NO RIGHT TO COUNSEL, EFFECTIVE OR OTHERWISE, ON COLLATERAL REVIEW.

Petitioners argue that the decision of the Appellate Court of Illinois must be vacated because the order of that court was entered without a brief being filed on their behalf. That argument is factually false and legally baseless. The argument made by petitioners should be rejected for the following reasons:

1. There was a brief filed for petitioners in the Appellate Court of Illinois in the form of a Petition for Rehearing, and, in addition, the Appellate Court had the benefit of the arguments successfully made by petitioners' attorney in the trial court.
2. There is a recent and definitive decision by this Court holding that there is no right to counsel, or to effective assistance of counsel, on collateral review in a criminal case. *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed. 2d 539 (1987).

Accordingly the petition for a writ of certiorari should be denied.

Pennsylvania v. Finley is directly in point in favor of respondent on this issue. *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed. 2d 539 (1987). In that case an attorney representing a convicted defendant in a state post-conviction action refused to pursue the matter, and instead withdrew as counsel for the petitioner. This Court ruled that no constitutional violation had occurred.

This Court specifically ruled that there was no right to counsel on collateral review in a criminal case. The opinion stated:

> We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks to their convictions and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further. (107 S.Ct. at 1993, Citation omitted)

Moreover, this Court specifically rejected the idea that an attorney on collateral review of a criminal conviction, when one appears, must provide effective assistance of counsel. Instead, this Court ruled that since there is no right to an attorney on collateral review, it follows that there is no right to an effective attorney on collateral review. 107 S.Ct. at 1994-95.

Thus *Finley* is directly on point. Petitioners here argue that their attorney on collateral review was ineffective for failure to file a brief on appeal. Even if that were true it would not amount to a constitutional violation. As stated in *Finley*, there is no right to effective assistance of counsel on collateral review in a criminal case.

Moreover, even if this Court were inclined to reconsider *Finley*, this would be the wrong case in which to do so. The record here proves that petitioners did receive adequate representation of counsel in the post-conviction appeal. Both in legal theory and in fact, the Appellate Court of Illinois was presented with numerous and effective arguments which could have led it to affirm the order granting a new trial. Certainly there was no complete denial of representation by counsel. *See United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed. 2d 657 (1984).

To begin with, the Appellate Court of Illinois had the benefit of the pleadings and arguments which convinced the trial judge in the post-conviction action to grant petitioners a new trial. Almost by definition, pleadings and arguments which were completely successful in the lower court cannot amount to complete denial of representation on appeal. After all, in post-conviction matters as in other matters in Illinois the findings of the trial court are presumed to be correct on appeal unless the appellant can show them to be manifestly erroneous. *People v. Stone*, 45 Ill. 2d 100, 256 N.E.2d 803 (1970); *People v. Henderson*, 136 Ill. App. 3d 1041, 483 N.E.2d 1068 (4th Dist. 1985); *People v. Matthews*, 37 Ill. App. 3d 1024, 347 N.E. 2d 385 (1st Dist. 1976).

The *Ross* decision of this Court is very much in point here. *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed. 341 (1974). In *Ross*, it was held that after the first appeal of right in a criminal case a defendant has no right to counsel in further discretionary appeals. This Court reasoned that when discretionary review is sought the defendant has the benefit of issues which were fully briefed and argued in the lower court. Similarly, petitioners here during the post-conviction appeal had the benefit of argu-

ments by their attorney which gave them a victory in the lower court.

Moreover, petitioners here did have counsel in the post-conviction appeal and those attorneys did file a brief in the Appellate Court of Illinois. While the appeal was in progress petitioners' current attorneys filed an appearance and later filed a Petition for Rehearing. (Petition 4, Appendix A-8–A-9) That Petition for Rehearing was a brief setting forth the reasons why petitioners felt that the ruling of the lower court should be affirmed. (Petition 4) Of course, petitioners' attorneys were under a procedural disadvantage when making their arguments in a petition for rehearing, but an attorney operating under a procedural disadvantage is very different from no attorney at all. Accordingly petitioners' assertion that no brief was filed for them in the Appellate Court is just not true.

Thus the *Penson* decision has nothing to do with this case. *Penson v. Ohio*, 109 S.Ct. 346 (1988). *Penson* involved a direct appeal from a criminal conviction in which the defendant has a right to counsel, while here petitioners have no right to counsel in the post-conviction appeal. The defense attorney in *Penson* refused to file a brief for his client, while here petitioners did have a brief filed on their behalf in the reviewing court. Petitioners also rely on the *Thomas* decision of the Seventh Circuit, in which it was held that it is automatically ineffective assistance of counsel when a defense attorney fails to file a brief when the prosecution brings an interlocutory appeal in a criminal case. *United States ex rel. Thomas v. O'Leary*, 856 F.2d 1011 (7th Cir. 1988). *Thomas* was wrongly decided, but this would not be a proper case to consider that question. Unlike *Thomas*, this case involves a post-conviction proceeding and unlike *Thomas*, in this case petitioners did have a brief filed by their attorneys in the state reviewing court.

In conclusion, it is well established that there is no right to counsel, or to effective assistance of counsel, when a convicted defendant seeks collateral review. Moreover, petitioners here did receive effective assistance of counsel, since the Appellate Court of Illinois had the benefit of briefs and arguments which were good enough to have won in the lower court. Therefore the petition for a writ of certiorari should be denied.

II.

THE NEED FOR COUNSEL IS AT A MINIMUM WHEN THE STATE APPEALS FROM A GRANT OF POST-CONVICTION RELIEF, BECAUSE THEN THE APPELLATE COURT IS AUTOMATICALLY BRIEFED WITH THE ARGUMENTS WHICH WON IN THE TRIAL COURT.

Petitioners argue that, even if there is no general right to counsel during collateral review of a conviction, nevertheless there should be a right to an attorney when a trial court grants post-conviction relief and the State appeals from that ruling. Petitioners have their policy arguments totally mixed up, because in fact the need for an attorney on collateral review is at a minimum when the convicted defendant has won in the trial court and is the appellee on review. Petitioners' argument should be rejected for the following reasons:

1. It is inconsistent with the *Finley* decision of this Court. *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed. 2d 539 (1987).
2. Petitioners' proposed exception to *Finley* is illogical, because it would create a right to counsel at the stage of post-conviction proceedings at which the usefulness of an attorney would be at a minimum.

In *Finley* this Court ruled, without any reservations or exceptions, that there was no right to counsel or to ef-

fective assistance of counsel on collateral review in a criminal case. *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed. 2d 539 (1987). Thus, under *Finley*, petitioners' argument that they had a right to effective assistance of counsel on appeal in a post-conviction action must be rejected.

Petitioners argue, however, that when a convicted defendant is granted post-conviction relief by a trial court, and the prosecution appeals, then the right to counsel attaches. The problem with that argument is that it would create a right to counsel in post-conviction proceedings at exactly the point at which an attorney would be of the least use. When a convicted defendant has been granted relief on the trial court level, then he does not have to do anything in order to have that decision affirmed on appeal. It then would be up to the State to prove that the trial court decision was wrong, and in reviewing that decision the appellate court will have the benefit of the evidence and arguments which won for the convicted defendant in the trial court. In legal theory the decision of a trial court is presumed correct on appeal, and it is up to the appellant to prove the trial judge wrong rather than up to the appellee to prove the judge right. In practice an appellate court reviewing a grant of post-conviction relief will read in the record on appeal both the arguments which convinced the trial judge to rule in favor of the convicted defendant and also the findings by the trial judge justifying his decision.

Thus, when the prosecution appeals from a grant of post-conviction relief, the convicted defendant could easily win without an attorney. Indeed, an attorney would be more useful at any other stage of collateral review of a conviction. An attorney might be useful in drafting a petition for post-conviction relief and in presenting legal argu-

ments in support of it. If an evidentiary hearing is held then an attorney might be useful in interrogating witnesses. If the trial judge rules against the convicted defendant, then an attorney might be useful in trying to convince a reviewing court that the trial judge was wrong. But when the trial judge grants post-conviction relief, then the convicted defendant can prevail on appeal without an attorney because the arguments which won in the trial court will automatically be before the reviewing court. *See Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed. 2d 341 (1974).

As previously noted, in Illinois the ruling of a trial judge on a post-conviction petition is presumed correct unless manifestly in error. *People v. Stone*, 45 Ill. 2d 100, 256 N.E.2d 803 (1970); *People v. Matthews*, 37 Ill. App. 3d 1024, 347 N.E.2d 385 (1st Dist. 1976). Thus, in the post-conviction appeal in this case, it was the burden of the State to show that the trial judge's ruling was wrong, and it was not the burden of petitioners to show anything. It would be irrational to say that petitioners had no right to counsel when they had the burden of proof in the post-conviction action, but did have a right to counsel when they had no burden at all.

In any event, petitioners did receive effective assistance of counsel in the post-conviction appeal. The arguments in their favor were more than adequately presented in the trial court record and in the Petition for Rehearing.

In conclusion, this Court has specifically held that there is no right to counsel in post-conviction proceedings. It would make no sense to apply that rule on collateral review at the trial court level but to make an exception to that rule when the prosecution appeals from a trial court ruling.

III.

THE NON-EXISTENT RIGHT TO A SPEEDY APPEAL IS NOT AT ISSUE HERE, SINCE THE DELAYS IN THE POST-CONVICTION APPEALS IN THIS MATTER HAVE BENEFITED PETITIONERS RATHER THAN HARMED THEM.

Petitioners ask this Court to establish a new constitutional right for convicted defendants, namely a right to a speedy appeal. For the following reasons this would be the wrong case in which to consider that question:

1. This case arose on collateral review after the convictions of petitioners became final, so the alleged right to speedy review of a criminal conviction is not at issue here.
2. Given the extremely tangled procedural history of this case, it is not at all clear who is responsible for the delay in final resolution of the matter.
3. Petitioners here, who are free on bond, have benefited enormously from the delays in a final ruling on the case, and have not been prejudiced in any way.

Petitioners have no reason at all to complain about delays in the appellate process. They were caught red-handed dealing in cocaine in 1980, and their testimony at trial showed that they had no defense to the charge. Nevertheless, about nine years have passed and petitioners have not yet started serving their sentences. Petitioners have not suggested that they have been prejudiced in any way by the delays in the ultimate resolution in this case. In the absence of prejudice, their claim of unreasonable delay should be rejected. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972).

As petitioners tacitly acknowledge, this Court has never held that there is a right to a speedy appeal in a crim-

inal case. Logically, if that question is ever considered by this Court it should be in a case involving the first appeal as of right from a criminal conviction. Petitioners' case, on the other hand, does not involve a right to a speedy appeal from a criminal conviction, but rather an alleged right to a speedy appeal on collateral review long after petitioners' convictions became final. The cases cited by petitioners involve the first appeal as of right from a conviction. *Burkett v. Cunningham*, 826 F.2d 1208 (3d Cir. 1987); *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980). Since the alleged right to a speedy appeal from a conviction is not involved in this case, certiorari should be denied.

Also, the procedural history of this case is too tangled to clearly present the issue of whether there is a right to a speedy appeal in a criminal case. There have been three appeals in this case, as well as a mandamus action which was an appeal for all practical purposes. It is the position of respondent that the delays in this case are primarily due to the actions of petitioners, and that petitioners are the only parties who have benefited from those delays.

Finally, the decisions of this Court indicate that there is no specific constitutional right to a speedy appeal in a criminal case. This Court has held the speedy trial clause of the Sixth Amendment applies only to the period when charges are pending in the trial court. *United States v. McDonald*, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed. 2d 696 (1982); *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed. 2d 752 (1977). More importantly, this Court has also held that the time consumed by an interlocutory appeal brought by the prosecution should not be considered on the question of whether the right to a speedy

trial had been violated. *United States v. Loud Hawk*, 474 U.S. 302, 106 S.Ct. 648, 88 L.Ed. 2d 640 (1986).

In conclusion, the question of whether there is a right to a speedy appeal in a criminal case is not at issue here. The appeal in this matter is not from a criminal conviction, but instead arose on collateral review after petitioners' convictions were final.

IV.

THE ISSUE RAISED BY PETITIONERS CONCERNING THE COMMENTS OF THE TRIAL JUDGE IS BARRED BY INDEPENDENT AND ADEQUATE STATE GROUNDS, AND IN ANY EVENT THOSE COMMENTS WERE LEGALLY IRRELEVANT BECAUSE THEY WERE MADE AT A TIME WHEN THE JUDGE HAD NO JURISDICTION TO HEAR TRIAL ISSUES.

Petitioners were convicted of a crime carrying a mandatory sentence of imprisonment. Ill. Rev. Stat. 1979, ch. 56½, sec. 1401. The trial judge, however, refused to follow the law and instead sentenced petitioners to probation. (T.R. 280) The Illinois Supreme Court ordered the trial judge to sentence petitioners as required by statute, but the judge still refused to obey the law. A year after the trial he declared, without giving any specific reason, that he had not given petitioners a fair trial and he vacated the convictions.

Petitioners argue that the trial judge's declaration on remand may not be questioned and was fatal to the convictions. This argument should be rejected for the following reasons:

1. It is barred by independent and adequate state grounds, because it should have been raised in the direct appeal from the convictions and sentences.

2. The statement of the trial judge on remand was of no legal effect or importance, since it was made at a time when that judge had no jurisdiction to consider any trial issues.

The second time the Illinois Supreme Court ordered the trial judge to sentence petitioners as required by law, the trial judge complied and imposed six year sentences. Petitioners then appealed the convictions and sentences to the Appellate Court of Illinois, but that appeal was dismissed for want of prosecution. Nevertheless, as the Appellate Court found in the present appeal, the *res judicata* effect of the direct appeal from the conviction bars consideration of this issue on collateral review in Illinois. (Petitioners' Appendix A-7)

In Illinois all issues which were raised or could have been raised on direct appeal are *res judicata* in post-conviction proceedings. *People v. Kubat*, 114 Ill. 2d 424, 501 N.E.2d 111 (1986); *People v. Roberts*, 75 Ill. 2d 1, 387 N.E.2d 331 (1979). Thus, as the Appellate Court of Illinois found, the issue of the trial judge's statement on remand was barred in the post-conviction proceedings because it could have been raised on direct appeal. This rule of *res judicata* in an independent and adequate state grounds supporting the decision, so certiorari should be denied. "Failure to present a federal constitutional question in conformance with state procedure constitutes an adequate and independent grounds of decision barring review by this Court, so long as the State has a legitimate interest in enforcing its procedural rule." *Michigan v. Tyler*, 436 U.S. 499, 512 n.7, 98 S.Ct. 1942, 1951 n.7, 56 L.Ed. 2d 486, 500 n.7 (1978).

Moreover, at the time the judge made his statement about a fair trial he had no jurisdiction over any trial

issues and no jurisdiction to vacate the convictions. Thus his comments had no more importance from a legal point of view then if they had been made at a cocktail party or on the street. A year after petitioners' trial this matter had been remanded to the trial court with a mandate to do one thing and one thing only, namely to sentence petitioners as required by law. As the Illinois Supreme Court later held, the trial judge at that point had authority only to follow that mandate, and had no jurisdiction to do anything else. *People ex rel. Daley v. Schreier*, 92 Ill. 2d 271, 442 N.E.2d 185 (1982). Petitioners rely on comments by a trial judge who, as a matter of state law, had no jurisdiction to consider the issue. This is another independent and adequate state ground supporting the decision of the Appellate Court.

Finally, the record indicates that the Appellate Court of Illinois was right when it found that petitioners had in fact received a fair trial. Indeed, evidence of guilt was overwhelming and the testimony of petitioners amounted to a plea for sympathy rather than a defense to the charge. Certiorari should be denied because petitioners were justly convicted.

In conclusion, petitioners' argument on this issue was barred under Illinois law by *res judicata*. In addition, petitioners rely on comments by a judge who, under Illinois law, has no jurisdiction to consider any trial issues. Since the decision of the Appellate Court of Illinois is supported by independent and adequate state grounds, certiorari should be denied.

CONCLUSION

Respondent, the People of the State of Illinois, respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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No. 88-966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MARIBETH SWEENEY and SUSAN SWEENEY,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

REPLY TO STATE'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

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REPLY TO JURISDICTIONAL STATEMENT

We are compelled to reply to Illinois' jurisdictional statement in its Brief in Opposition to the Petitioners' Petition for Writ of Certiorari because it is dishonest and misleading. The State claims that this Honorable Court lacks jurisdiction because the arguments raised in our certiorari petition "were never made in the Illinois courts". State's Brief, at 2. This claim is false. After the Illinois Appellate Court rendered the decision adverse to the petitioners ab-

sent the filing of any brief on their behalf, the petitioners obtained new counsel who filed, in the Illinois Appellate Court, a motion seeking remand and a petition for rehearing.[1] After the appellate court denied the motion seeking remand and the petition for rehearing, we filed a petition for leave to appeal in the Illinois Supreme Court and a motion requesting reconsideration of the denial of the petition for leave to appeal or vacation of the appellate court's decision. All of the issues raised in the certiorari petition were set forth among these filings and were plainly premised upon the federal constitution. The motion seeking remand—filed concomitantly with the petition for rehearing—noted that the petitioners had been deprived of the right to a speedy appeal by virtue of the fact that it took the State approximately two years to file a brief in the post-conviction appeal and effective assistance of counsel by their former counsel's failure to file a brief in the direct appeal and in the State's appeal of the order granting post-conviction relief. The Petition for Leave to Appeal in the Illinois Supreme Court, expressly raised the following points:

I. THE APPELLATE COURT ABUSED ITS DISCRETION AND DENIED THE SWEENEYS DUE PROCESS BY REVERSING AN ORDER GRANTING THEM POST-CONVICTION RELIEF ABSENT THE FILING OF AN APPELLATE BRIEF ON THEIR BEHALF.

II. BECAUSE THE SWEENEYS' COUNSEL FAILED TO FILE A BRIEF, THE DECISION OF THE APPELLATE COURT IS TAINTED BY INEFFECTIVE ASSISTANCE OF COUNSEL.

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[1] Illinois' characterizing the petition for rehearing as a "brief" is also misleading. The petition for rehearing did not purport to be a brief on the merits and was not presented *before* the rendering of a decision depriving the petitioners of liberty.

III. THE APPELLATE COURT ERRED IN FINDING THAT POST-CONVICTION RELIEF HAD BEEN IMPROPERLY GRANTED WHERE THE TRIAL JUDGE EXPRESSLY FOUND THAT HE HAD RENDERED AN UNFAIR TRIAL AND THAT STATEMENT FINDS SUPPORT IN THE RECORD.

Further, in the motion requesting the Illinois Supreme Court's reconsideration of the denial of leave to appeal, the petitioners, relying upon the recent case of *United States ex rel. Thomas v. O'Leary*, 856 F.2d 1011 (7th Cir. 1988), which held that a habeas corpus petitioner had been deprived of effective assistance of counsel where his counsel failed to file a brief in a State-initiated appeal, again pressed the ineffective assistance of counsel and due process claims. Illinois states that review by this Court is limited to "federal questions presented to the highest court of a state having jurisdiction". State's Brief, at 3. As can be seen, Issue ## I, II and IV in the petition for certiorari were undoubtedly presented to the highest court in Illinois. Thus, the State's claim that we have never raised the issues set forth in the certiorari petition in the Illinois' courts utterly and wholly lacks merit. This Court plainly has jurisdiction and certiorari should be granted for the reasons set forth in our petition.

Respectfully submitted,

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